

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LYON HOMES, INC., A  
CALIFORNIA CORPORATION,  
Appellant,  
vs.  
JAMES SMART AND TANYA SMART,  
Respondents.

No. 43765

**FILED**

**JAN 25 2006**

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. Bloom*  
CHIEF DEPUTY CLERK

This an appeal from a district court order that awarded respondents costs and attorney fees pursuant to respondents' offer of judgment. Eighth Judicial District Court, Clark County; Stephen L. Huffaker, Judge.

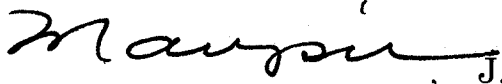

An offer of judgment made pursuant to NRCP 68 is contractual in nature—there must be mutual assent to, and understanding of, the terms in the offer to form a valid agreement.<sup>1</sup> Here, respondents tendered, under NRCP 68 and NRS 17.115, an offer to appellant for judgment to be taken against it for damages and the return of deposits, “plus attorney fees and costs.” But, appellant’s purported acceptance stated in relevant part that “by accepting this [offer] [appellant] does not concede [that respondents] are in any way entitled to

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<sup>1</sup>See Fleischer v. August, 103 Nev. 242, 246, 737 P.2d 518, 521 (1987) (comparing an offer of judgment to contract law requiring that there be mutual assent to, and understanding of, the terms in the offer); Blair v. Shanahan, 795 F. Supp. 309, 313 (N.D. Cal. 1992) (stating that a contract was formed by an offer of judgment and acceptance thereof); Davis v. Chism, 513 P.2d 475, 481 (Alaska 1973) (“An offer of judgment and acceptance thereof is a contract.”); Ash v. Chandler, 530 N.E.2d 303, 306 (Ind. Ct. App. 1988) (recognizing that an offer of judgment may be construed as a contract, and the rules of contract construction apply).

attorney[ ] fees.” In light of this discrepancy, appellant never assented to the material terms of the offer of judgment. Thus, interpreting the offer of judgment in light of elementary principles of contract law, the resulting agreement is unenforceable.<sup>2</sup> Accordingly, we reverse the district court’s order and remand this matter to the district court for further proceedings.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Maupin  
  
\_\_\_\_\_, J.  
Gibbons

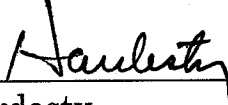
cc: Hon. Stephen L. Huffaker, Senior Judge  
Lee & Russell  
James Smart  
Tanya Smart  
Clark County Clerk

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<sup>2</sup>See Restatement (Second) of Contracts § 59 (1981) (“A reply to an offer which purports to accept it but is conditional on the offeror’s assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.”); *id.* cmt. a (“A qualified or conditional acceptance proposes an exchange different from that proposed by the original offeror. Such a proposal is a counter-offer and ordinarily terminates the power of acceptance of the original offeree.”)

HARDESTY, J., concurring in the result:

Although I agree that the district court's order should be reversed and this matter remanded, I would remand for an evidentiary hearing on the ambiguity concerning any provision for attorney fees in the offer of judgment and acceptance.

  
\_\_\_\_\_, J.  
Hardesty